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Spartanburg Water System
Attn: Public Comments
P.O. Box 251
Spartanburg, South Carolina 29304

To Whom It May Concern:

Pursuant to your request for public comments on a draft set of rules and regulations for the management of the drinking reservoirs, I am submitting the following comments on behalf of my client, Lake Front Property Owners Association.

1. Comments on the overall revised Rules and Regulations.

We have identified several overarching issues related to the draft Watershed Reservoir Management Rules and Regulations ("Draft Regs") as a whole including a lack of both procedural and substantive due process, the assumption of authority and powers not granted to SWS, misapplication and/or incorrect reference to state statutes, and the claiming of fee simple property ownership to navigable waters. The following comments about specific sections outline key examples of the aforementioned concerns, but is in no way meant to be inclusive of all legal, technical or procedural issues identified in the Draft Regs.

We also would note that the Draft Regs (1) are overly duplicative, repeating the same information numerous times throughout the document, (2) at times address the same issue differently in different sections, and (3) contain numerous typographical errors. We have not attempted to correct each of these drafting errors.

As requested, we have attempted to focus comments to particular sections of the Draft Regs. However, it may be helpful to understand many of the comments stem from two basic problems: (1) SWS overreaching in its statement of its ownership rights and management authority, and (2) the scope and lack of due process in the enforcement and appeal provisions. SWS seems to ignore the fact that the reservoirs are navigable waters, the deeds of some landowners expressly give them rights to the use and access of some of the SWS property, and some of the deeds by which SWS acquired the property call for recreational use by the public to be protected. There are also pre-

existing easement agreements with some landowners which would be improperly impacted by the Draft Regs. The enforcement provisions improperly give SWS the absolute power to punish without proof of wrong-doing, without notice, and without proper procedures for the landowner to challenge the enforcement.

2. Feedback for the Rules and Regulations Section 1. Introduction, Definitions and General Provisions

Section 1.1 Introduction

This section claims, "Access to all reservoirs and SWS owned land around them is by written permission from SWS in the form of a fully executed access agreement....Whenever adjoining landowners are granted such access, it is with the express understanding that SWS may terminate that access whenever SWS determines that doing so is necessary to protect SWS's interest in effectively managing Lake Bowen and Lake Blalock reservoirs and Municipal Reservoir #1." This section attempts to grant SWS rights and authority not given to it by the State. The reservoirs are navigable waters. As a matter of law, navigable waters and the land beneath navigable waters is owned by the State. Authority for management and use of those waters rests with the State, with a presumption that the public is entitled to use and access. The State has delegated some authority to SWS by statute, but clearly not the complete authority SWS is claiming.

Section 1.3 Lake and Property Ownership

SWS cites S.C. Code Ann. § 5-31-1120, Interfering with Property or Appurtenances, to support the "posting of signs and/or survey benchmarks to assist in the identifying of the property boundary." It suggests the removal or defacing of such signs or survey benchmarks may be a criminal act punishable under South Carolina law. The applicable statute provides, "It shall be unlawful for any person to interfere or tamper with any of *the property or appurtenances belonging to a municipality or controlled by the commissioners of public works*...without first having obtained the proper permit so to do from the authorized representatives of such municipality or the commissioners of public works or other such body." A sign or survey benchmark placed on a homeowners adjacent property is not an appurtenance belonging to SWS and is not on SWS property.

Section 1.4 Commissioners of Public Works of the City of Spartanburg Authority and Jurisdiction

Section 1.4.2 "Pursuant to South Carolina Law, SWS has the responsibility and the legal right to take all action necessary to maintain and protect its' water system, including capital assets such as Lake Bowen reservoir, Lake Blalock reservoir, and Municipal Reservoir #1 to ensure that these assets have a long and useful lifespan." This section does not clarify which "law" grants such authority and it is not clear such

authority exists. The S.C. Code provisions specifically related to these reservoirs, S.C. Code Ann. § 50-25-1310 et seq., do not grant the powers you claim herein.

Section 1.4.3 "These Watershed and Reservoir Management Rules and regulations are a regulation of SWS. Under Section 22-102 of the Spartanburg Municipal Code, SWS regulations are enforceable as Spartanburg city ordinances with fines up to \$500 or 30 days in jail per violation. See S.C. Code Ann § 5-7-30." This is an improper use and application of the cited statute, and contrary to the language of the cited statute. Although Section 5-7-30 does allow a municipality to fix fines for violations of municipal ordinances and regulations up to the quoted amount, it also expressly states that the law "shall not extend the effect of the laws of the municipality beyond its corporate boundaries" The reservoirs are well outside of the corporate boundaries of the City of Spartanburg. As such, any attempt to enforce powers under the authority cited in this section would be unlawful.

3. Feedback for the Rules and Regulations Section 2. Prohibitions and Limitations on Reservoir Uses

Section 2.1.1 "No person shall use gasoline, oil, lubricants, pesticides, herbicides, fertilizers, or any other toxic or hazardous substance that may cause pollution of the water supply provided the use of gasoline and lubricants is permitted only for the proper operation of motorized boats." This provision would prohibit any gas powered tools under any circumstance, including the mowing of grass on SWS property with a gasoline powered mower by anyone. Other sections of the Draft Regs are in conflict with this absolute prohibition. For example, **Section 5.11.3** states "no clearing or cutting of any vegetation, to include but not limited to grasses, vines, shrubs, immature trees, seedlings, herbaceous plants and forest floor leaf and hummus layers, shall be allowed *without the appropriate permits* and/or authorization by SWS." This suggests using power tools, such as a lawn mower may be done with a permit. Likewise, **Section 5.12.18** allows for routine lawn maintenance of existing lawns on SWS property that may consist of "mowing," and places no limit on the type of mower that can be used.

Section 2.1.20 "The Warden may deny an access permit to any owner of a boat, watercraft, or any other type of vessel that the Warden deems to be in unsafe condition." This is arbitrary and establishes no specific guidelines or criteria to be used in making a determination as to what is considered an unsafe condition.

Section 2.1.30 This provision cites an incorrect statute. S.C. Code Ann. § 15-25-1330 has no bearing on the reservoirs. It is likely the intended section was § 50-25-1330.

Section 2.3 Requests for Variances of Prohibited Uses, Activities or Actions

Under proposed **Section 2.3.2** SWS states "all decisions of the Commission either approving or denying the request for variance are final." This is contrary to other

sections of the Draft Regs regarding review of SWS determinations. If applied as written, this section does not permit a property owner to challenge or appeal the decision and denies them due process.

4. Feedback for the Rules and Regulations Section 3. Permits and Authorizations for Reservoir Uses

Under the "Rationale for Permits and Authorizations," the Draft Regs state "failure to obtain the necessary permits from SWS for uses and activities within the SWS Property boundary may result in SWS's exercise of *any and all of its enforcement rights* pursuant to these Rules and Regulations and applicable law." This provides no procedural due process limits or guidance. There should be guidance as to what enforcement action should be chosen based on, and in proportion to, the offense committed. Failure to obtain a permit should not entitle SWS to use any remedy it so chooses, from a fine to removal of a dock or other structure. This not only allows, but seems to invite, arbitrary and capricious enforcement proceedings. There must be clearly defined enforcement guidelines which are proportionate to the alleged offense.

3.2 Change of Adjoining Property Ownership

SWS's proposed rules and regulations suggest all adjoining property owners should disclose the rules and regulations to prospective buyers of their property before closing, although "all permits, licenses, and agreements are not transferrable with change of title/ownership." There is no basis in law for requiring a property owner to educate others on municipal regulations. Further, Section 6.16.5 of the Draft Regs state "no additional permits will be issued with reference to any parcel of property until all existing issues related to a violation are resolved..." It also states in Section 6.16.6 that the "transfer of title while violations remain unresolved will not remove the suspension." The notion that the permits and agreements are not transferrable, while the penalties run with the title to the property binding a subsequent property owner who did not commit the violation, are inconsistent and improper.

Section 3.3.4 "All letters, permits, licenses, agreements and approvals shall be subject to revocation at any time by SWS." This section suggests SWS can, without notice or due process, revoke any of the above mentioned items for any reason whatsoever. As with other provisions, this not only allows, but seems to invite, arbitrary and capricious enforcement proceedings.

Another example of the arbitrary nature of the Draft Regs can be found in Sections 3.4.7 and 3.4.9 which state "requirements for docks placed in a cove will be determined on a case-by-case basis," and SWS staff may limit or deny a proposed dock and walkway or other structure if it is deemed inappropriate, too congested, unsafe or "otherwise unacceptable." There is no definition or guideline describing what may be considered unacceptable.

Section 3.5.8 allows only 5 days after written notice for a property owner to remove a “non-conforming” structure, such as a dock. Removal of a dock, while complying with the other provisions of the Draft Regs, would likely be impossible within 5 days. This brief time period is even more difficult to understand when compared to other provisions in the Draft Regs which allow for 30 to 45 days for compliance. This is unreasonable and inconsistent.

Section 3.11.1 requires that a new permit be issued if an applicant wishes to replace an existing dock, and allows for “transfer of ownership of docks” under the Dock Replacement permit. However, **Section 3.11.2** specifically states “all dock permits are non-transferrable.” These sections are in direct conflict with one another.

Section 3.13.8 allows SWS to “revoke Boat Permits as part of a land-based permit non-compliance enforcement action.” This would permit SWS to pull your dock or boat permit if you cut the grass in violation of the rules. The punishment in this case is entirely unrelated to the actual offense committed. This is another example of a provision in the Draft Regs that not only allows, but seems to invite, arbitrary and capricious enforcement proceedings.

Section 3.14.18 allows for irrigation permits to be “suspended or revoked at the sole discretion of SWS.” This suggests they may be suspended or revoked without just cause and for no legitimate reason.

Section 3.15.9 allows SWS to “suspend or revoke all permits under the Adjacent Property Owner’s name” if the property owner grades or adjusts the topography of the buffer zone. Again, the punishment is unrelated to the actual offense.

Although we do not have specific edits regarding the provisions within **Section 3.15** regarding pathways, we would note these provisions are poorly worded, at times unclear in their meaning, and difficult to understand. If clarity is a goal of the Draft Regs, some re-drafting of these provisions would be prudent.

5. Feedback for the Rules and Regulations Section 4. Adjoining Property Management

The provisions attempting to regulate conduct on property which is adjacent to but not owned by SWS is overly broad. For example, **Section 4.1.3** purports to prohibit water from “any outflow pipe” from crossing SWS property and entering the reservoirs. By its express terms, most houses around the reservoirs would be in violation every time it rains because downspouts on gutters are “outflow pipes” and the natural contour of the land would require water coming from these downspouts to travel across SWS property and into the reservoirs. Likewise, **Section 4.1.6** suggests a property owner may be punished if stormwater “impacts any aspect of SWS Property or the reservoirs.” As written, this allows punishment even if the property owner was not at fault and imposes a completely subjective standard easily subject to abuse.

6. Feedback for the Rules and Regulations Section 5. SWS Property Management

Section 5.1 Boundary Line Marking

Section 5.1.3 SWS requires the adjacent property owner to bear responsibility for “protecting any boundary markers from being removed, defaced, or destroyed.”

Section 5.1.4 also requires the landowner to pay a “reasonable charge for replacing boundary markers that are not so protected.” It is not the responsibility of the landowner to police said markers, and it is within their rights to remove any marker placed on the landowner’s own property.

Section 5.2.3 requires a landowner to employ a registered land surveyor and at his sole expense pay to establish the location of the contour elevation, “subject to review by SWS.” The property owners have not tried to alter or move the property lines established on their duly records deeds. SWS should not attempt to impose financial burdens on the property owners regarding property lines which have been set for years.

Section 5.4.2 requires any permitted shoreline stabilization to follow “all guidelines and definitions as outlined in the SWS Shoreline Stabilization Guidelines.” These guidelines are not added as an Appendix and there is no indication as to where these guidelines can be found.

Section 5.5.2 allows “existing seawalls to remain as installed until such point in time that SWS determines them to be considered derelict or hazardous to water quality or recreational users of the lake.” There is no guidance or definition as to what conditions create a derelict or hazardous seawall.

Section 5.5.4 and Section 5.7.3 further state that “walls requiring removal will be assessed on a case-by-case basis” and “existing licensed boat ramps can be utilized until such time as they fall out of an acceptable condition.” These are additional examples of an arbitrary decision-making process with undefined parameters and expectations.

Section 5.8.8 and Section 5.8.9 require an adjoining landowner to pay for the removal of downed or storm damaged trees from SWS property, any pruning of an overgrown tree on SWS property, replacement of any damage caused by a damaged or fallen tree on SWS property, and the replanting of damaged vegetation at landowner’s expense. SWS takes no responsibility for maintaining its’ own property and instead requires an adjoining landowner to remove and remedy damage he did not actually cause.

Section 5.8.19 requires adjacent landowners who agree to plant vegetation per a valid permit to “be responsible for the continued health and care of the planted vegetation

throughout the entire time they own the property...and SWS must be notified immediately should the health of the vegetation planted on SWS property begin to decline." There is no clear indication of what constitutes "decline."

Section 5.15.7 states "all unpermitted/unlicensed structures will be removed from SWS property." This section does not require notice or due process.

7. Feedback for the Rules and Regulations Section 6. Enforcement of Rules and Regulations for Water Supply Reservoir

Section 6.1 Lake Wardens and Watershed Management Staff (SWS Staff)

Section 6.1.2 allows the Wardens to "deny admission to SWS property to any person known to have willfully violated any of these policies and procedures." This section presumes guilt and immediately imposes a penalty without proper notice and due process. Similarly, **Section 6.1.4** deprives landowners due process by allowing the Wardens to revoke and "immediately seize" a permit when the holder or operator violates *any* of the policies or procedures governing the use of SWS reservoirs or property.

Section 6.2 Enforcement Response Guidelines

This section suggests the "enforcement response selected shall be appropriate to the violation," but does not outline what those responses would be for specific violations or what is considered appropriate. This entire section incorporates enforcement actions and penalties that are not clearly defined, and which can be imposed without notice or proper due process protections.

Section 6.3.3 allows for a Letter of Violation or Notice of Violation when the "violation is not significant," and **Section 6.3.6** requires a Letter of Violation in "instances of significant violation." There is no indication as to what is or is not a significant or insignificant violation.

Section 6.4.1 and **Section 6.4.2** allow SWS to issue an Administrative Order (AO) directing a permittee to cease or undertake specified activities. It specifically states "the terms of the AO may or may not be negotiated with the permittee. An AO may incorporate compliance schedules, penalties, suspension or termination of permits, or other requirements." There is neither required notice or due process before imposing penalties, nor an opportunity to dispute the charge.

Section 6.6.4 allows SWS to "determine whether escalated enforcement response is warranted and, if so, its nature and extent." It states SWS "may explore the circumstances surrounding the violation and evaluate the sufficiency of evidence for civil or criminal actions." **Section 6.6.7** states "SWS may use whatever enforcement remedies are available" and automatically impose penalties and "refer the case for

civil litigation or criminal prosecution.” There is no requirement that an accused landowner be notified that the information being gathered may be used for criminal prosecution and that he may have accompanying legal rights. There is also no clearly outlined process by which the landowner may challenge or be heard regarding the allegations before a penalty is imposed.

Section 6.8 Suspension or Revocation of Permit

This section allows SWS to temporarily or permanently cancel a user’s privilege to access SWS property or associated permits through issuance of an AO, by court ruling, or by simply physically removing the permit and structures belonging to the landowner on SWS property. SWS states this is an appropriate response when “SWS must act immediately to halt or prevent further activity which presents a threat to human health, the environment, or SWS property.” This allows SWS to immediately take or destroy property owned by the property owner, such as docks, boat ramps, or other allowed structures without due process or an opportunity to dispute the alleged violation.

It further states the “types of violations that warrant revocation include, but are not limited to, those listed in these Watershed and Reservoir Management Rules and regulations.” As written, the Draft Regs purport to authorize SWS to immediately, and without due process, physically destroy and remove any landowner’s property, structure or improvement at any time for any reason whatsoever.

Section 6.12 Supplemental Enforcement Responses; Section 6.13 Citations; Section 6.14 Fines and Jail; Section 6.15 Assessments for Costs and Damages; Section 6.16 Permit Revocation/Denial; Section 6.17 Non-admittance

SWS states these may be used “to complement the more traditional enforcement responses described in the preceding sections” and would be used “in conjunction with more traditional approaches for the purpose of reinforcing the compliance obligations of users.” It further states the “application of supplemental approaches is determined on a case-by-case basis.” It lists criminal citations issued by lake wardens, fines and jail, assessments for costs and damages, permit revocation or denial, and non-admittance as examples of supplemental enforcement responses. SWS purports to have expanded authority to act as law enforcement “in appropriate circumstances” and issue criminal citations for non-compliance with its proposed rules and regulations. The referenced citations SWS “may issue” could result in potential criminal penalties of up to 5 years imprisonment and/or up to \$5000 fine.

SWS also states they can assess a violator for all costs and damages arising out of a violation or enforcement of the SWS proposed rules and regulations, including SWS staff time and administrative costs for responding to the violation. This provision is egregious and includes no formula or mechanism for determining when and how those costs would be determined and assessed or by whom.

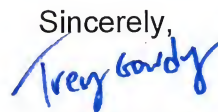
Finally, SWS asserts that violations of *any rule or permit* "may result in the revocation of *all permits* held by a Property Owner, including both land permits and watercraft permits." This is overreaching and arbitrary, with no correlation between the rule allegedly violated and resulting penalty.

Section 6.19 Enforcement Action Appeals Process

SWS outlines an "appeals process" to be used after an enforcement action has been taken and penalty imposed. The appeal is limited to SWS staff who would be reviewing their own decisions or the decisions of other members of the SWS staff. An appeal goes first to the COO and then to the CEO. The Draft Regs state, "the decision of the CEO is the final decision of SWS." In many instances, this is merely a "review" by the person who authorized the enforcement action.

It then states "all appeals from the final decision of the Commission shall be heard by the Court of Common Pleas," however there is no reference to the appeal ever being heard by the Commission. Additionally, when read in conjunction with the remaining provisions of the Draft Regs, an appeal has no impact on ongoing enforcement actions by SWS. At a minimum, all enforcement actions must cease while an appeal is being considered to ensure that the appealing party is treated fairly and protected from arbitrary and capricious enforcement.

We appreciate the opportunity to provide feedback. Please feel free to contact me if you have any questions or need additional information.

Sincerely,

Trey Gowdy

CC: Mayor Junie White
Chris Story, Spartanburg City Manager
Spartanburg City Councilman Sterling Anderson
Spartanburg City Councilwoman Erica Brown
Spartanburg City Councilman Jamie Fulmer
Spartanburg City Councilman Alan Jenkins
Spartanburg City Councilwoman Ruth Littlejohn
Spartanburg City Councilman Jerome Rice
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Commissioner Horace Littlejohn, City of Spartanburg Public Works Commission
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